[2022 Gib LR 1]

ANIDJAR BROTHERS LIMITED v. ANIDJAR

SUPREME COURT (Yeats, J.): January 10th, 2022

2022/GSC/001

Landlord and Tenant—possession—action for possession—corporate leasehold owner of apartment occupied by son of one of directors and shareholders entitled to possession after serving notice to quit—father's earlier offer to forgo his 50% share of sale proceeds if son purchased apartment conditional gift not assignment of beneficial ownership—son failed to raise funds for purchase and notice to quit served on him—not unconscionable for father to change mind as to gift

The claimant sought possession of an apartment.

The claimant company ("ABL") was the leasehold owner of an apartment. The directors and shareholders of ABL were two brothers. The defendant was the son of one of the brothers and lived in the apartment. The defendant was given a notice to quit the apartment in May 2018. He claimed that in June 2018, his father and uncle agreed to sell the apartment to him. The sale price was fixed at £186,890. He was to pay half of that sum to his uncle, with his father agreeing to forgo receipt of his share of the sale proceeds (the uncle subsequently agreed to receive the lower sum of £84,100). In July 2018, the defendant's father signed a letter which had been prepared by the defendant's lawyers stating *inter alia*: "As a 50% shareholder, I will be making an irrevocable and non-repayable gift of my 50% share of the purchase price . . . to [the defendant] on the basis of my love and affection."

Despite the agreement, no sale was completed. The defendant had difficulties obtaining funding. In December 2019, the defendant was given a further notice to quit and informed that a claim would be issued for possession of the apartment.

ABL brought this claim for possession of the apartment. ABL submitted that there was no defence to the claim for possession. ABL were the leasehold owners of the apartment and the defendant was a licensee. ABL had served a notice to quit on the defendant but the apartment had not been vacated. ABL was therefore entitled to judgment.

The defendant claimed to be a 50% beneficial owner of the tenancy. He submitted that (a) his father and uncle had agreed to sell the apartment to him and it was not a condition that time would be of the essence; (b) the agreement to sell the apartment was therefore still extant; (c) as part of the

agreement, his father had agreed to transfer his 50% of the apartment to him out of love and affection; (d) nothing more needed to be done by the father to perfect the gift and the gift was irrevocable once the June 2018 letter was signed; and (e) to renege on the agreement at this late stage would be unconscionable.

The defendant's father confirmed in a witness statement that in 2018 he had been happy to assist the defendant by forgoing his entitlement to a share of the sale proceeds but that he was no longer prepared to do so because his own financial situation had changed and his relationship with the defendant had deteriorated. He had recently been asked by the defendant for a second letter in the same terms as the July 2018 letter, which he had refused to provide.

Held, ruling as follows:

The defendant was not the beneficial owner of one-half of the apartment. He was a licensee who had been given a notice to quit. ABL was therefore entitled to an order for possession of the apartment. The June 2018 letter made a conditional gift. It was a gift which would have been made if the defendant had been in a position to purchase the apartment by paying his uncle the sum of £84,100. The words "irrevocable and non-repayable" were used in the context that, if the sale were completed, the defendant's father would not make any demand for payment of his share of the proceeds of sale in the future. The evidence supported the conclusion that this was a conditional gift. At no time in the extensive correspondence that passed between the parties' solicitors after July 2018 was there any suggestion that the defendant was the beneficial owner of one-half of the apartment or that his father was holding his shares on trust for the defendant. In his evidence at trial the defendant confirmed that he did not consider that he owned anything, merely that it had been agreed that he would be able to purchase the apartment and only have to pay for half of it. The defendant's father could have assigned his shares in ABL to the defendant at any time, but he did not do so. He simply agreed to forgo his share in the proceeds of sale. No beneficial interest in the apartment was assigned to the defendant by the June 2018 letter. As to whether the 2018 agreement was still extant, time was not made of the essence but clearly there was an expectation that the purchase would be completed by the defendant within a reasonable time. In any event, the agreement had been overtaken by events. In December 2019, the defendant had been given a further notice to quit and a letter before action. It would have been clear following receipt of that letter that ABL did not consider that the agreement was still in place. Whatever the moral position, the defendant's father was under no legal obligation to honour the commitment he gave in 2018. If the court were wrong about the agreement being simply a conditional gift and that, consequently, there might be an imperfect gift to the defendant, could the defendant's father still change his mind? The objectives of the rule that the court would not perfect an imperfect gift included ensuring that donors did not act unwisely in a way they might subsequently regret. There were

countervailing policy considerations which included effectuating rather than frustrating the clear and continuing intention of the donor and preventing the donor from acting in a manner which was unconscionable. In the present case, the defendant's father did not necessarily act unwisely in forfeiting his share of the proceeds of sale. A parent gifting property to a child was common. However, there came a point when the agreement to sell was impliedly brought to an end. The defendant's father's evidence was that he was no longer in the same financial position as he had been in 2018. The defendant claimed that he and the bank had acted to their detriment following the provision by his father of the June 2018 letter which would make it unconscionable for his father to change his mind as to the gift. However, aside from the defendant's bare assertion, there was no evidence that he was in a position to complete on the 2018 terms; there was no evidence of what moneys he might have spent; and there was no evidence from the bank. Furthermore, if the defendant acted to his detriment, he did so recently and in the knowledge that ABL and his father were proceeding on the basis that the agreement was no longer in place (paras. 40–52).

Cases cited:
(1) *Mascall* v. *Mascall* (1985), 50 P. & C.R. 119, considered.
(2) *Milroy* v. *Lord* (1862), 4 De G.F. & J. 264; 45 E.R. 1185, considered.
(3) *Pehrsson (Trustee)* v. *Von Greyerz*, 1999–00 Gib LR 231, considered.
(4) *Pennington* v. *Waine*, [2002] EWCA Civ 227; [2002] 1 W.L.R. 2075; [2002] 4 All E.R. 215; [2002] 2 BCLC 448; [2002] WTLR 387, considered.
(5) *T. Choithram Intl. S.A.* v. *Pagarini*, [2000] UKPC 46; [2001] 1 W.L.R. 1, considered.

D. Feetham, *Q.C.* with *H. Lopez* (instructed by Hassans) for the claimant; *C. Finch* (instructed by Verralls) for the defendant.

1 **YEATS, J.:** The claimant company ("ABL") is the leasehold owner of an apartment at 17 Rosbay Court, Old Naval Hospital, Gibraltar ("the apartment"). The directors and shareholders of ABL are William Anidjar Serfaty and Raphael Anidjar. They are brothers. The defendant, Saul Anidjar, is William Anidjar Serfaty's son. He lives in the apartment. This is a claim by ABL for possession of the apartment. (In this judgment, I shall refer to these individuals by their first names.)

2 By a deed of assignment made on December 29th, 1978, ABL was assigned the unexpired residue of the lease on the apartment. In 1993 or 1994, William, his wife Maria del Pilar Bassadone-Anidjar and their son Saul took up occupation of the premises. The marriage later broke down and, as part of the divorce settlement in 2002, it was agreed that Saul and his mother were to remain in the apartment until 2010. Since 2010, and up until notice to vacate was given to Saul in 2018, ABL says that Saul was

allowed to remain in occupation as a licensee on the sole basis of his father's love and affection. (The notice to vacate was given on May 9th, 2018 and expired on July 10th, 2018.) ABL's case is that since July 10th, 2018 Saul has been a trespasser.

3 The claim for possession is contested by Saul. He says that on or about June 2018 Raphael and William agreed to sell the apartment to him. The sale price was fixed at £186,890. He was to pay half of that sum to Raphael with William agreeing to forgo receipt of his share of the proceeds of sale. (Raphael subsequently agreed to receive the lower sum of £84,100.) Although, for various reasons, Saul has been unable to complete the purchase, he says that a bank is now willing to lend him the amount required. In any event, Saul asserts that, as a result of the June 2018 agreement, and as evidenced in a letter dated June 27th, 2018 signed by William, he is the beneficial owner of a one-half share of the lease over the apartment. ABL is therefore unable to seek an order for possession as against him.

4 Raphael, William and Saul all gave evidence at the hearing.

The evidence

5 Raphael filed two witness statements. The first dated March 4th, 2021 and the second dated September 3rd, 2021. Raphael explains that his father had been in business with one Lionel Desoiza. Shortly before his father's death, they had parted ways and Mr. Desoiza had agreed to assign the apartment to Raphael's father in order to pay him for his share in the business. As his father passed away before the assignment could take place, the apartment was assigned to ABL—which had been incorporated by Raphael and William for that purpose. The apartment was then rented out by ABL and the income provided to their mother until she passed away in 2003. (From 1992 to 2003, William himself paid the rent to ABL for the benefit of his mother.) Since 2003, no rent has been paid on the apartment.

6 In around 2010, Raphael started raising with William the fact that he was not receiving any income from his 50% share in ABL. However, it was not until sometime in 2014 that the matter was first raised by Raphael with Saul. At para. 10 of his second witness statement Raphael says that he called Saul but that Saul refused to pay any rent. Raphael states:

> "When I told him that he should be paying rent, he told me that he was not going to pay any rent as the flat was his grandfather's which meant that it was his."

Raphael and Saul thereafter exchanged some proposals as to renting and/or the option of Saul buying the apartment but these came to nothing.

7 In November 2017, Raphael and William instructed Messrs. Hassans. This led to a meeting in February 2018 attended by Raphael, William and

Saul together with their respective lawyers. At the meeting, it was agreed that Saul would buy the apartment but would only pay one-half of the purchase price which was to go to Raphael. William would gift his share of the proceeds of sale to his son. There followed some further discussions apparently brought about by Saul's inability to raise sufficient funds by way of mortgage. In June 2018 an agreement was finally reached. Raphael would receive the sum of £84,100 and the apartment would be assigned to Saul.

8 Despite the agreement, no sale was completed. In correspondence exchanged between Daniel Feetham, Q.C., acting for Raphael and William, and Kenneth Navas who at the material times was acting for Saul, it is apparent that Raphael was giving Saul every opportunity to complete despite him missing successive deadlines. On December 12th, 2019, Hassans wrote to Kenneth Navas Barristers & Solicitors informing them that they were instructed to issue a claim for possession of the apartment. Although ABL's contention was that Saul was a licensee, they provided him with a further three months' notice to quit which expired on March 13th, 2020.

9 In cross-examination, it was put to Raphael that no rent had ever been fixed or demanded from Saul. Raphael agreed that no rental agreement had been signed but insisted that he had asked Saul to pay rent. Raphael denied knowing that the delays to obtaining mortgage funding were because unauthorized works had been carried out to the apartment by William which now needed to be rectified. He said that he had first learnt of that when he read Saul's witness statement. When it was put to him that funding was now available and that Saul could complete the transaction, Raphael said that their position was that they wanted to sell the property. He confirmed that if Saul was able to complete within two or three weeks he would be happy to sell to him for the initial price. Raphael then clarified that ABL would have to decide to sell and that he could not speak for William.

10 William made a witness statement on September 3rd, 2021. In it, he confirms that in 2018 he was happy to assist Saul by foregoing any entitlement to his share of the proceeds of sale. However, he is no longer prepared to do so. William explains that his own financial situation has changed and that he is consequently no longer able to simply give up his interest for no consideration. He also says that his relationship with Saul has deteriorated and does not agree with Saul's "attitude of entitlement."

11 As to the 2018 agreement, William confirmed that the parties met in February 2018 and an agreement reached for the sale of the apartment to Saul. Raphael was to be paid £93,445 by Saul and William would give up his share of the proceeds. (The amount to be paid to Raphael was later reduced to £84,100.)

12 By May 2018, the purchase had not been completed and ABL was concerned by the delay. Wanting matters resolved one way or another, ABL instructed their lawyers to issue a notice to vacate. The notice was given in an email from Mr. Feetham to Mr. Navas of May 9th, 2018.

13 Notwithstanding notice having been given, the parties met again on July 12th, 2018 and on that day William was persuaded to sign a letter addressed to the Royal Bank of Scotland which had been prepared by Saul's lawyers and which was dated June 27th, 2018. The letter *inter alia* stated the following:

> ". . . ABL has agreed to sell to Saul 17 Rosbay Court (the flat), which it owns, for the price of £186,890.
>
> As a 50% shareholder, I will be making an irrevocable and non-repayable gift of my 50% share of the purchase price, namely £93,445, to Saul on the basis of my love and affection.
>
> The remaining 50% of the purchase price for the flat due to my brother Raphael will be financed in the following manner:
>
> (1) £84,100 to be raised by Saul by way of mortgage.
>
> (2) I will make a further irrevocable and non-repayable gift of the remaining balance of £9,345 due to Raphael, to Saul on the basis of my love and affection."

14 William's evidence was that he was told that the bank required him to say that he would be paying the sum of £9,345 to his brother even though there was never any intention to do so. He described it as a "technicality." (Although not explained, I am assuming that this was required by the bank either to maintain loan to value margins or so that the whole of the purchase price was accounted for and thereby remove any doubt as to whether the entire legal interest in the apartment was being assigned to Saul.)

15 In cross-examination, when asked if he was willing to honour his word to gift his share of the proceeds to Saul, William expressed an enduring love for his son but said that their relationship was "destroyed." That things were now more complicated than they had been back in 2018 and he was no longer willing to give away his interest in the apartment. It was also put to William by Mr. Finch that he had never told Saul that he could not rely on the June 27th, 2018 letter. William replied that he had not told him because the situation had changed. William further explained that he had recently been asked by Saul for a second letter, in similar terms to the letter of June 27th, 2018, but that he had refused to provide this.

16 In re-examination, William was referred to an email from Mr. Navas to Mr. Feetham of October 29th, 2019. (By that time, it had become apparent that some of the difficulties Saul was facing with obtaining a mortgage was that the residue of the term of years granted by the lease did

not provide the banks with acceptable security and there were difficulties being encountered in extending the leases in the building.) In the email, Mr. Navas made proposals for Saul to pay for the apartment in instalments of £400 per month until such time as the lease was extended and Saul could obtain a mortgage for the balance. Raphael and William thought that this was a ridiculous proposal and it was rejected. William confirmed that they had then instructed Hassans to issue a notice to quit in December 2019. He considered that it would therefore have been apparent that they wanted the apartment back and that the 2018 agreement was no longer on the table.

17 Saul's witness statement dated September 23rd, 2021 was filed and served out of time. Consequently, an application for relief from sanctions was made by Mr. Finch. Mr. Feetham indicated that he would object to the admission of the witness statement if Mr. Finch's intention was to follow the admission of the statement with an application to amend the defence as a result of what was being said in it. As Mr. Finch was not seeking to amend Saul's defence, I gave him permission to rely on the witness statement.

18 In his witness statement, Saul explains how his family moved from Madrid to Gibraltar when he was a young boy and how they came to live in the apartment. On his parents' divorce, he remained in the apartment with his mother and eventually on his own. Saul then says the following at paras. 12 and 13 of his statement:

> "[12] In or around 2018 I received a call from my uncle, who stated that I either had to start paying rent for the premises or to buy them. Renting premises without owning them would be unduly onerous for me whereas a mortgage was far more attractive. I was assisted in this by a grant of £10,000 from my mother and my father gifting me his 50% equitable ownership in the premises, so all I had to do was obtain a mortgage for my uncle's share.
>
> [13] There was a meeting at the time, with my father, uncle, Mr. D Feetham and my lawyer, Mr. K Navas I believe, and at that meeting my father confirmed that he had gifted me his 50% ownership in the premises, not the company, and what was required was for my uncle to stipulate how much he wanted in order that I could become 100% owner of the premises. My uncle accepted this and stated that he wanted £95,000 for his share."

19 Saul then explains his efforts in trying to obtain funding from banks to be able to purchase Raphael's share in the property. The first bank he went to refused the application because it was closing down its operations in Gibraltar. The second bank initially agreed to lend him the moneys but this was subsequently refused. The reason given was that the period of time left to run on the underlease was too short and the bank did not consider that it afforded sufficient security for the lending. A third bank also refused Saul's application on the same ground—the shortness of the unexpired

residue of the underlease. A fourth bank eventually agreed to give him a mortgage but when the premises were examined by the bank's surveyor it was observed that the premises had been altered (according to Saul by William) in a manner that would have required planning permission, but this had not been obtained. Saul then states that he will be commissioning works to resolve the planning issue.

20 Saul ends his witness statement with the following assertions:

> "[23] It is unacceptable that my father should now throw in his lot with my uncle because the premises are now worth more in this sudden uplift in property values in Gibraltar. Once he had given me the 50% equitable share and once I had spent enormous time, energy and money to obtain a mortgage in part performance of my agreement to purchase my uncle's share, he cannot just take it back. Once you have given someone a gift and it has been confirmed as having been made and received by the person receiving it, who accepts it, I am advised that the disposition is complete and I am the owner of 50% of the premises in equity.
>
> [24] There was never any condition that time was of the essence, albeit everybody wanted the transaction to be completed as quickly as possible, and it is only through historical mistakes, the most recent one being the responsibility of my father directly, and the pandemic, that time has passed. My mother and the bank have also made commitments upon my father's assurance of the gift of his share in the premises, and it would be wholly inequitable for him to try and slide out of his obligations just because there has been an increase in value. I am ready, willing and able to honour my commitments and complete the purchase of the premises and I accordingly request the court to dismiss the application for possession now before it."

21 In cross-examination, Saul insisted that William had given him the 50% share in the flat without any conditions. That it was a gift. He could not recollect whether Raphael had made the February 2018 offer open only until the end of that month although he accepted it was a possibility. Saul was trying to obtain funding and had wanted to proceed quickly but had been prevented from doing so due to circumstances beyond his control.

22 In an email from Mr. Navas to Mr. Feetham of May 15th, 2018, Mr. Navas made proposals which included payment of £81,500 to Raphael and "no consideration to my client's father." Saul agreed that this showed that there was no trust prior to that date and that he did not own anything. Saul said in answer to questions by Mr. Feetham: "The idea is for me to buy. I have never said that I am the owner." This point was further addressed in an email of May 29th, 2018 from Mr. Navas to Mr. Feetham which, amongst other things, says: "In the meantime, please confirm the outstanding points in my previous email, namely: 2 No consideration to my client's father."

23 Mr. Feetham also took Saul to an email of September 13th, 2018 which Mr. Feetham had sent Mr. Navas. In it, he says that if the transaction was not completed by the Wednesday of the following week that ABL would issue a notice to quit. Saul said that he believed he had been forwarded the email. He then reiterated that he had never told his lawyer to say that ABL could not give notice because he already owned one-half of the property. He said: "I don't believe that. I don't own any of the property." In re-examination Saul clarified that he considered he had been given an irrevocable gift by William. That the first time that he heard that William would not be honouring the gift he made was when he read his witness statement in these proceedings.

24 Saul accepted that Raphael and William had been patient but explained that things take time. His lawyer also had some personal issues which unfortunately added to the delays. In October 2019, he had made an offer to start paying instalments of £400 every month which would go towards the purchase price, because he could not get a mortgage. The issues with the unauthorized works only arose with the last bank. He had approached them in the beginning of 2021. In February 2021, he asked William for confirmation that the June 2018 letter was still valid but this was not forthcoming. "Communications had shut down by that stage."

25 During the course of the hearing, references were made to text messages exchanged between Saul and William in March 2021. Print-outs of some of the messages were produced. These show that on March 11th, 2021, Saul tells William that the bank is asking him for a letter "saying that you are giving me your half." William does not reply to this request. The following day Saul again messages his father and says: "Please can you send me the letter? Pretty please." William replies that any request to do with the apartment should be channelled via their respective lawyers. Saul then asks: "Are you still giving me Saul your 50%?" William again responds that Saul is to contact the lawyers.

Saul's pleaded defence

26 At para. 2 of his defence, Saul says the following:

> "that he is in equity a 50% owner of the tenancy, the same having been irrevocably bestowed upon him out of natural love and affection by [William] in writing on the 27 June 2018, a director and 50% shareholder of the claimant, and a person who had apparent authority to gift the same."

27 At para. 4, Saul admits that in 1978 there was an assignment of the legal and beneficial ownership of the apartment to ABL but that, on June 27th, 2018, William, with Raphael's knowledge and consent, "conveyed in equity" 50% of the beneficial ownership of the apartment to Saul.

28 At paras. 5 and 6, Saul admits that notice to quit was given on May 9th, 2018 and that it was to take effect on July 10th, 2018 but states the following at para. 6:

> "between the two dates stated in the notice, namely on the 27 June 2018, a settlement was reached in the terms set out in letter, which was good consideration in equity to constitute a conveyance of the beneficial interest in the relevant underlease."

29 At paras. 7 and 8, Saul then states as follows:

> "[7] It is conceded that it has taken the Defendant a period in which to raise the money by way of mortgage for the payment to be made to Raphael, which when effected, would have the legal and beneficial effect of transferring the entire estate in the Premises to the Defendant. However, the Defendant now has a mortgage agreed and can pay Raphael Anidjar the agreed amount that his father, William, had reserved for him and which Raphael Anidjar had accepted. Time was not made of the essence and it is submitted that the Defendant has complied within a reasonable time, particularly considering the recent restrictions.
>
> [8] Accordingly, the Defendant will say that the claim for possession is misconceived in law and equity and the order cannot go in good conscience."

The parties' submissions

30 It was submitted on behalf of ABL that there was simply no defence to the claim for possession. ABL are the leasehold owners of the apartment and Saul was a licensee. ABL served a notice to quit on Saul but the premises have not been vacated. That being so, ABL say they are entitled to judgment.

31 In outline, Mr. Finch's submissions on behalf of Saul were the following. William and Raphael agreed to sell the apartment to Saul and it was not a condition of the sale that time would be of the essence. Therefore, the agreement to sell the apartment is still extant. As part of the agreement, William agreed to transfer his 50% of the apartment to Saul out of love and affection. Nothing more needed to be done by William to make this gift happen. The letter was all that was required. Further, that this gift was irrevocable once the letter of June 27th, 2018 was signed. The letter was intended for third parties to rely on—the promise going beyond simply the donor and donee, and it has never been withdrawn. To renege on the agreement at this late stage would be unconscionable as time has passed and Saul and the banks have acted to their detriment as a result of the agreement. Mr. Finch also submitted that the fact that the unauthorized works to the apartment were identified at a late stage by a bank surveyor

should not be held against Saul. Indeed, that the agreement entered into for the sale of the apartment must be read as being subject to the works being carried out. Saul has now addressed the matter at his expense and it would be wrong and unconscionable to abort the transaction.

32 Mr. Feetham's reply was that, until the hearing, it had never been suggested that the letter of June 27th, 2018 or the agreement of that time had created a constructive trust. No constructive trust was pleaded in Saul's defence and Mr. Finch was inviting the court to go beyond his pleaded case to now find that the letter constitutes a constructive trust. Such an assertion would have had to be pleaded and it was not. In any event, William and Raphael did not retain an equitable interest in the apartment. They are simply shareholders (and directors) of ABL. William could therefore not transfer any beneficial interest in the apartment to anyone. This basic proposition defeats any argument by Saul as to being, in equity, a 50% beneficial owner of the apartment.

33 As to the letter, Mr. Feetham submitted that this was clearly just a gift of the proceeds of sale. It cannot constitute a declaration of trust as to ownership of the apartment itself nor was it an open-ended commitment by William. Testament to that is the fact that when the offer of October 2019 was made (the offer of payment of rent which would go to reduce the eventual capital payment to Raphael) it was not suggested by Saul's then solicitors that Saul was already a 50% owner of the apartment. This is further evidenced by the text messages sent by Saul to William in March 2021 where Saul inquires whether the gift would still be made.

34 A number of authorities were referred to by counsel. Mr. Feetham relied on *Pehrsson (Trustee)* v. *Von Greyerz* (3), a Gibraltar case before the Privy Council. One of the issues there was the point at which ownership of shares in a company (which owned a yacht) passed to the respondent. The trustee alleged that the transfer of the shares was a fraudulent conveyance whereas the respondent's case was that she had received the beneficial interest as a gift sometime before the legal interest was in fact transferred. Lord Hoffmann said the following (1999–00 Gib LR 231, at para. 26):

> "So in this case it seems to their Lordships that the gift was intended to take effect by a transfer of the shares and it is therefore impossible to construe it as having taken place by a change in the beneficial interest before the transfer had been registered. It is true that in accordance with the decision in *In re Rose* [[1952] Ch. 499], a gift of shares will be regarded as completed even before registration when the donor has clothed the beneficiary with the power to obtain registration. Thus, when the donor has executed a transfer and delivered it to the beneficiary or his agent, equity regards the gift as completed. No further act on the part of the donor is needed to vest the legal title in the beneficiary and the donor has no power to prevent

> it. But this principle could not apply to the present case until the nominee shareholders had executed transfers to Miss von Greyerz or her nominee and delivered them into her possession or constituted themselves agents for her. Until that time, they remained nominees for Mr. Pehrsson and it was open to him to countermand the gift. Since the transfers to Miss von Greyerz and Mr. Pehrsson (treating him as Miss von Greyerz's nominee) were not executed until the same day as registration took place, the principle in *In re Rose* is of no assistance to her."

35 Their Lordships in *Pehrsson* v. *Von Greyerz* referred to *Milroy* v. *Lord* (2), where Turner, L.J. said (45 E.R. at 1189–1190):

> "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

Mr. Feetham pointed to the fact that all Saul has in this case is a letter to the bank setting out his father's agreement to forgo his share in the proceeds of sale. That, it is said, cannot amount to the transfer of a beneficial interest in the apartment. The transfer of the apartment would only take place on the execution of a deed of assignment to Saul. Furthermore, that Saul is intending to transform an imperfect gift into a declaration of trust—and that offends the principle in *Milroy* v. *Lord*.

36 In his written submissions, Mr. Feetham also referred to *Mascall* v. *Mascall* (1), a case before the English Court of Appeal, which is a particularly relevant example of when equity will regard a gift as completed. In that case, a father who wished to gift a property to his son,

executed the transfer document and handed it, together with the title deeds, to him. Before the transfer could be registered, and following a breakdown in their relationship, the father changed his mind. The court held that the donor had done everything that was required of him and the donee had everything in his control to complete the transaction. In the circumstances, the gift was complete and, pending registration, the father held the property on trust for the son. Mr. Feetham's submission was that in our case it cannot be said that William was a donor who had done everything in his power to complete a gift. William was not acting as a director of ABL when he signed the letter of June 27th, 2018 and there was never any intention to create a trust.

37 Both parties referred to the English Court of Appeal case of *Pennington* v. *Waine* (4). This was a case brought by the executors of a deceased's estate. The court was asked to determine whether a purported gift of shares in a company amounted to an equitable assignment of the shares before the deceased's death or whether the shares fell into the residue of her estate. Mr. Finch submitted that this more modern case is the most relevant of the authorities which were cited at the hearing. He relied in particular on Arden, L.J.'s judgment where Her Ladyship was discussing exceptions to the principle that equity will not assist a volunteer (in the context of the volunteer not having perfected his intention to make a gift). The learned judge said the following ([2002] EWCA Civ 227, at para. 59):

> "59. Secondly equity has tempered the wind (of the principle that equity will not assist a volunteer) to the shorn lamb (the donee) by utilising the constructive trust. This does not constitute a declaration of trust and thus does not fall foul of the principle (see *Milroy v Lord* and *Jones v Lock*, above) that an imperfectly constituted gift is not saved by being treated as a declaration of trust. Thus, for example, in the *Choitram* case the Privy Council held that the assets which the donor gave to the foundation of which he was one of the trustees were held upon trust to vest the same in all the trustees of the foundation on the terms of the trusts of the foundation. This particular trust obligation was not a term of the express trust constituting the foundation but a constructive trust adjunct to it. So, too, in *Re Rose, Rose v IRC* the Court of Appeal held that the beneficial interest in the shares passed when the share transfers were delivered to the transferee, and that consequently the transferor was a trustee of the legal estate in the shares from that date. At one stage in his judgment Evershed MR went further and held that an equitable interest passed when the document declaring a gift was executed. Evershed MR said (at 510):
>
> > If a man executes a document transferring all his equitable interest, say, in shares, that document, operating, and intended to operate, as a transfer, will give rise to and take effect as a trust,

> for the assignor will then be a trustee of the legal estate in the shares for the person in whose favour he has made an assignment of his beneficial interest. For my part, I do not think that *Milroy v Lord* is an authority which compels this court to hold that in this case, where, in the terms of the judgment of Turner LJ the settlor did everything which, according to the nature of the property comprised in the settlement, was necessary to be done by him in order to transfer the property, the result necessarily negatives the conclusion that, pending registration, the settlor was a trustee of the legal interest for the transferee."

38 Mr. Feetham submitted that *Pennington* v. *Waine* does not assist Saul. The effect of this authority is that where a donor has not done everything in his power to complete a transaction making a gift, the court will only give effect to the intention to make a gift in three circumstances. The first where, on the facts, the court finds that a trust was created by the donor or there was an agency relationship between the donor and the donee; the second where it would be unconscionable for the donor to renege on his promise to make the gift; and the third being an exception which applies to the assignment of shares under the UK's Stock Transfer Act 1963. None of these, it was submitted, applied to our case.

39 In *T. Choithram Intl. S.A.* v. *Pagarini* (5) (referred to in *Pennington* v. *Waine*), the deceased, on his deathbed, gifted his property to his charitable foundation, but all required steps to transfer the property to the foundation were not taken prior to his death. His potential heirs on an intestacy claimed the property. The Privy Council considered that the case was raising a novel point. It was neither a case where a gift had been perfected by a transfer to the donee nor had the donor declared himself a trustee of the gifted property for the donee. The court nevertheless held that the gift had been completed when the property had been vested by the deceased in himself as trustee of the foundation. As trustee, he was (or would have been) obliged to transfer the assets into the names of all the other trustees and it would not have been equitable for him to go back on that gift. In reaching this conclusion, Lord Browne-Wilkinson said ([2001] 1 W.L.R. at 11): "Although equity will not aid a volunteer, it will not strive officiously to defeat a gift." Mr. Finch highlighted this proposition.

Discussion

40 The starting point in any analysis must be the letter of June 27th, 2018. What does this document really say? What is the context in which the letter was signed? Clearly, the parties reached an agreement to sell the apartment to Saul. The agreement was that Raphael be paid the sum of £84,100 by Saul and nothing would be payable to William. The letter was required by the bank and had been drafted by Saul's lawyers. The transaction was never completed because Saul was unable to raise what he had to pay to Raphael.

41 The operative part of the letter says the following:

> "ABL has agreed to sell to Saul [the apartment], which it owns, for the price of £186,890.
>
> As a 50% shareholder, I will be making an irrevocable and non-repayable gift of my 50% share of the purchase price, namely £93,445, to Saul on the basis of my love and affection."

I make a number of observations. (1) The letter is made on paper which has William's name and his personal details as its letterhead. It is not made by ABL nor does it purport to be made by or on behalf of ABL. (2) William recites the fact that *ABL* has agreed to sell the apartment to Saul. It could not be any other way because the apartment was owned by ABL and not by Raphael and William. (3) William says that he *will* be making an irrevocable gift. He does not say that he has made it. (4) The gift is of William's share of the purchase price. It is a gift of the moneys that would be due to William on the assignment of the apartment. (5) It is a letter to a bank informing the bank that the gift would be made. Its principal purpose must have been to satisfy the bank that all that Saul needed to raise was the £84,100. The letter of itself transfers nothing. (6) No trust is declared or evidenced in the letter.

42 In my judgment, the letter makes a conditional gift. It was a gift which would have been made if Saul had been in a position to purchase the apartment by paying Raphael the sum of £84,100. It was only then that the gift would have been made. The words "irrevocable and non-repayable" are used in the context that, if the sale was completed, William would not make any demand for payment of his share of the proceeds of sale in the future.

43 The evidence supports the conclusion that this was a conditional gift. At no time in the extensive correspondence that passes between the parties' solicitors after July 2018 is there any suggestion that Saul is the beneficial owner of one-half of the apartment or that William is holding his shares on trust for Saul. Indeed, Saul was himself under no misapprehension. In a message to his father on March 12th, 2021, he asked whether he was still being given the "50%." It follows that I do not therefore accept Saul's assertion in para. 13 of his witness statement whereby he states that William "confirmed that he had gifted [Saul] his 50% ownership in the premises." In fact, Saul's evidence at trial suggested the opposite. He confirmed that he did not consider that he owned anything just that it had been agreed that he would be able to buy the apartment and only have to pay for half of it. The gift was not complete. It required ABL to execute a deed of assignment—which it did not do because Saul was unable to provide the consideration due to Raphael.

44 William could have assigned his shares in ABL to Saul at any time. He did not do so. (Clearly, because that could have placed Raphael in some difficulty if Saul then decided not to complete the agreement.) William simply agreed to forego his share in the proceeds of sale.

45 Mr. Finch suggested, as I understood him, that William and Raphael were at all material times the beneficial owners of the apartment because ABL never paid any consideration for the assignment by Mr. Desoisa. That being so, William could, and did, assign his beneficial interest to Saul. Such a submission in my judgment fails. The assignment to ABL in 1978 was by deed and therefore no consideration was required for the legal and beneficial title to pass. In any event, I observe that at para. 4 of Saul's defence it is admitted that the legal and beneficial ownership of the apartment passed to ABL at the time of the assignment. No beneficial entitlement in the apartment was therefore vested or retained by William. (Of course, Raphael and William are the controlling minds and owners of ABL—but that is another matter.)

46 In my judgment, no beneficial interest in the apartment was assigned to Saul by William's letter of June 27th, 2018.

47 Is the 2018 agreement still extant? Whilst I accept Mr. Finch's submission that time was not made of the essence, clearly there was an expectation that the purchase would be completed by Saul within a reasonable time. The evidence bears that out. There were numerous emails being exchanged where it is clear that ABL (principally Raphael) wanted the transaction completed and was getting exasperated by the delays. The agreement was made over three years ago. It has not been completed. It was, in any case, overtaken by events. On December 12th, 2019, Messrs. Hassans wrote to Saul giving a further notice to quit and with a "letter before claim." In the latter, ABL's solicitors refer to the fact that Saul has been allowed to reside in the apartment after 2010 on licence and then say the following:

> "[8] Discussions have since taken place in order to explore your client's ability to purchase the premises from our Client. A settlement never materialised.
>
> [9] Our client now wishes to either receive vacant possession of the premises or it will issue possession proceedings."

It would certainly have been clear following receipt of this letter that ABL did not consider that the agreement was still in place. They considered that sufficient time had by then passed and that they simply wanted the apartment back.

48 At the hearing, Raphael confirmed that he would still be willing to sell the apartment to Saul in accordance with the 2018 agreement. However, as he rightly pointed out, it is ABL who has to decide to do that and therefore

this requires William's agreement. Whatever the moral position might be, I consider that William is under no legal obligation to honour the commitment he gave in 2018. He agreed to make a gift which was conditional on Saul paying Raphael. The condition was not fulfilled.

49 If I am wrong about William's agreement being simply a conditional gift and that, consequently, there may be an imperfect gift to Saul, can William still change his mind? In *Pennington* v. *Waine* (4), Arden, L.J. when discussing the policy considerations behind the rule that the court will not perfect an imperfect gift said the following ([2002] EWCA Civ 227, at para. 62):

> "The objectives of the rule obviously include ensuring that donors do not by acting voluntarily act unwisely in a way that they may subsequently regret. This objective is furthered by permitting donors to change their minds at any time before it becomes completely constituted."

She continued (*ibid.*, at para. 63):

> "63. There are countervailing policy considerations which would militate in favour of holding a gift to be completely constituted. These would include effectuating, rather than frustrating, the clear and continuing intention of the donor, and preventing the donor from acting in a manner which is unconscionable."

50 William was not necessarily acting unwisely in forfeiting his share of the proceeds of sale. A parent gifting property to a child is common. However, it is clear that there came a point when the agreement to sell was impliedly brought to an end. William's evidence is that he is no longer in the same financial position as he was in 2018. Of course, it is also apparent that his relationship with Saul has broken down and, as William himself accepted, this has influenced his change of heart.

51 Saul says that he and the bank have acted to their detriment following the provision by William of the letter of June 2018. That he has spent money correcting the works that were carried out by William many years ago and that fees and expenses have been incurred in the mortgage application process, including surveyor's fees. This, he says, makes it unconscionable for William to change his mind as to the gift. He would not have taken those steps had it not been for his father's gift. I would make the following observations. Aside from Saul's bare assertion, there is no evidence that he is in a position to complete on the 2018 terms; there is no evidence of what moneys may have been spent by him; and there is no evidence from the bank. More importantly, Saul's evidence was that he instructed the latest bank in early 2021. Further, that the works to the apartment were only very recently undertaken. This has got to be looked at in the context of the following matters/timeline. First, ABL gave him a

second notice to quit on December 11th, 2019. Secondly, ABL filed this claim for possession on February 3rd, 2021. (The claim form was served on Saul on February 5th, 2021.) Thirdly, on March 11th, 2021, Saul asked for, but did not get, a second letter addressed to the new bank. Fourthly, on March 12th, 2021, Saul was told to speak to the lawyers after he asked William whether he was still getting the 50%. If therefore Saul acted to his detriment, he did so in the knowledge that ABL and William were proceeding on the basis that the agreement was no longer in place. The fact that, in those circumstances, he chose to continue trying to obtain the mortgage funding and/or carried out works to the apartment cannot be relied on to say that it is unconscionable for William to change his mind about the gift he was prepared to make in 2018. On the facts, he does not come within the exception in *Pennington* v. *Waine* (4).

Conclusion

52 For the reasons set out in this judgment, I conclude that Saul is not the beneficial owner of one-half of the apartment. He was a licensee who was given "notice to vacate" on May 9th, 2018 and a further "notice to quit" on December 12th, 2019. ABL are entitled to an order for possession of the apartment.

Ruling accordingly.